

(9)
No. 87-1796

Supreme Court, U.S.
FILED
NOV 22 1988

JOSEPH F. SPANIOL, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RUTH MASSINGA, ET AL., PETITIONERS

v.

L.J., ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

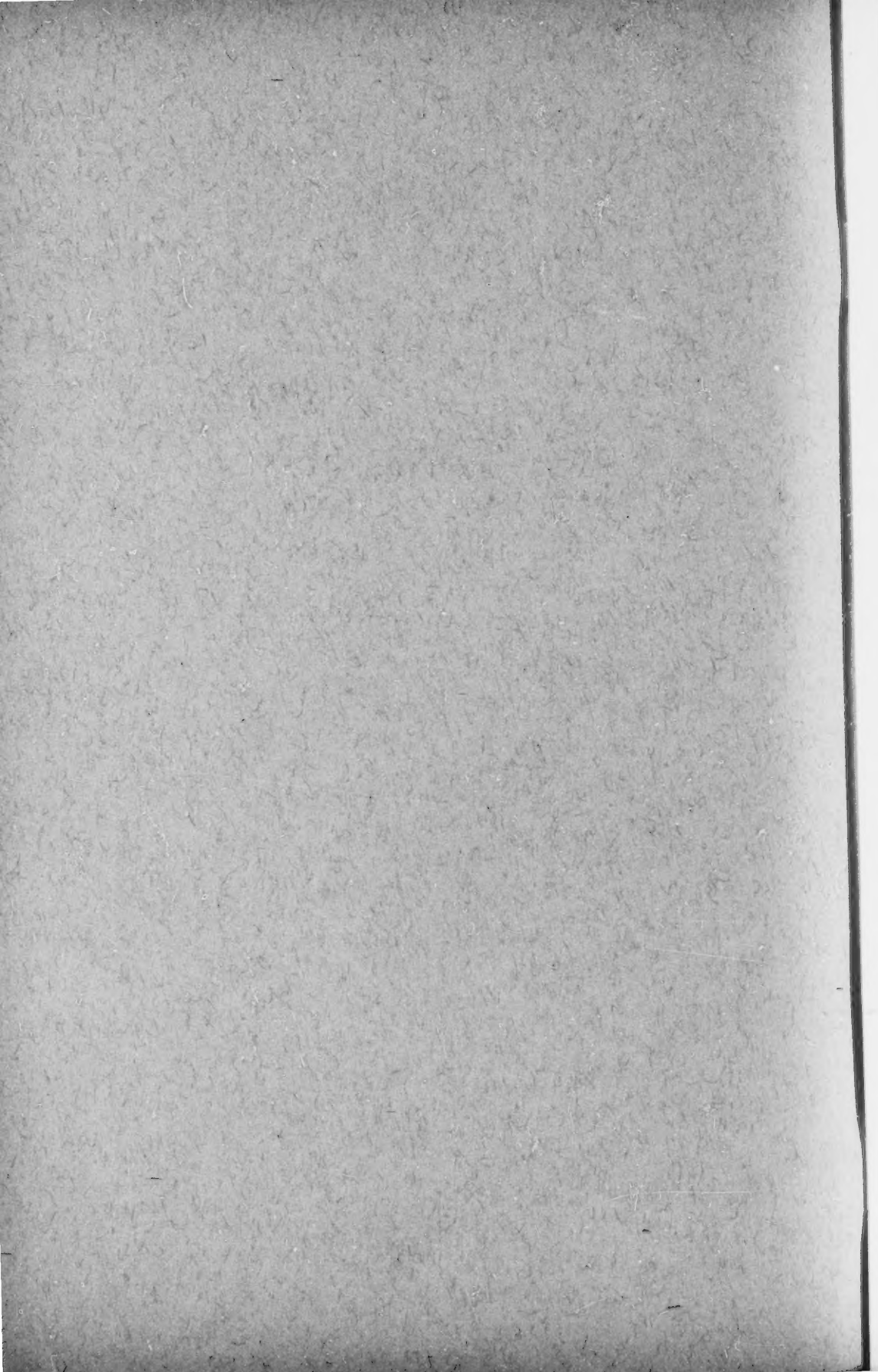
DONALD B. AYER
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

JOHN F. CORDES
SCOTT R. MCINTOSH
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

24 PH



QUESTIONS PRESENTED

1. Whether there is a private cause of action for damages under 42 U.S.C. 1983 for violations of the foster care provisions of the Social Security Act, 42 U.S.C. (& Supp. IV) 601 *et seq.*, 620 *et seq.*, and 670 *et seq.*

2. Assuming that there is such a cause of action, whether petitioners, who are Maryland state and local social welfare employees, are entitled to qualified immunity in a lawsuit asserting that cause of action.



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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

This case involves an attempt to hold social welfare workers financially liable for injuries suffered by foster children while in the care of their foster parents. Respondents, children placed in foster homes by Maryland social welfare agencies, claim to have suffered abuse and neglect because petitioners, state and local social welfare workers, failed adequately to supervise the care provided by respondents' foster parents. Respondents claim that petitioners' actions violate the foster care provisions of the Social Security Act.

1. Title IV-A of the Social Security Act, 42 U.S.C. (& Supp. IV) 601 *et seq.*, establishes the Aid to Families with

Dependent Children (AFDC) program. Under Title IV-A, the federal government reimburses eligible states for a specified portion of the costs incurred in providing assistance to needy families with dependent children. 42 U.S.C. (& Supp. IV) 601, 603(a). In order to be eligible for federal AFDC funding, a state must submit a "state plan" to the Secretary of Health and Human Services for approval. *Ibid.* Title IV-A specifies a variety of substantive and procedural provisions that must be contained in a state plan in order for it to be approved by the Secretary. 42 U.S.C. (& Supp. IV) 602(a). Once a state plan has been approved, if the Secretary finds "a failure [on the part of the state] to comply substantially with any provision required * * * to be included in the plan," the Secretary may limit or discontinue federal funding until the state restores itself to compliance. 42 U.S.C. 604(a).

In 1961, Congress amended Title IV-A to cover assistance to foster children. See generally *Miller v. Youakim*, 440 U.S. 125 (1979). From 1961 to 1980, the principal provisions of the AFDC program regarding foster care were set forth in Section 408 of the Social Security Act, 42 U.S.C. (1976 ed. & Supp. IV 1980) 608 (repealed 1980). Section 408 imposed several conditions on states seeking AFDC reimbursement for foster care services. Among its conditions, Section 408(f) required states to include in their state plans "provision[s] for * * * development of a plan for each [foster] child * * * to assure that he receives proper care * * *." 42 U.S.C. (1976 ed.) 608(f).

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (Adoption Assistance Act). The Adoption Assistance Act repealed Section 408 of the Social Security Act and replaced it with a new Title IV-E. §§ 101(a)(1)-(2), 94 Stat. 501-512 (codified at 42 U.S.C. (& Supp. IV) 670 *et seq.*). Like former Section 408, Title IV-E imposes conditions

that states must meet in order to be eligible for AFDC foster care funds. See 42 U.S.C. (& Supp. IV) 671(a). Those conditions include an expanded set of requirements relating to the health and safety of foster children.

First, state plans must provide for the development of a "case plan" and a "case review system" for each eligible foster child. 42 U.S.C. (& Supp. IV) 671(a)(16). The case plan must include "a plan for assuring that the child receives proper care and that services are provided * * * [to] address the needs of the child while in foster care * * *." 42 U.S.C. (& Supp. IV) 675(1). The case review system must provide a mechanism by which the status of eligible foster care children is reviewed at least every six months "in order to determine the continuing necessity for and appropriateness of the placement [and] the extent of compliance with the case plan * * *." 42 U.S.C. 675(5)(B).

Second, state plans must provide for the establishing and maintaining of standards for foster family homes "which are reasonably in accord with recommended standards of national [foster care] organizations * * *, including standards related to * * * safety, sanitation, and protection of civil rights * * *." 42 U.S.C. 671(a)(10). Such standards, once established, "shall be applied by the State to any foster family home" receiving AFDC foster care maintenance payments. *Ibid.*

Third, state plans must provide that when any state agency "has reason to believe" that a foster home "is unsuitable for the child because of the neglect, abuse, or exploitation of such child," the agency shall notify "the appropriate court or law enforcement agency." 42 U.S.C. 671(a)(9).¹

¹ A state's "substantial failure" to comply with the provisions of an approved state foster care plan, including the provisions relating to foster child health and safety, authorizes the Secretary to limit or discontinue AFDC funding under Title IV-E. 42 U.S.C. 671(b).

In addition to adding the foster care requirements of Title IV-E, the Adoption Assistance Act incorporates foster care requirements into Title IV-B, 42 U.S.C. (& Supp. IV) 620 *et seq.*, which provides additional federal funding for state child welfare services. As amended, Title IV-B disqualifies a state from receiving specified federal funding for child welfare services unless the state conducts a semi-annual "inventory" of foster children under its care to determine, *inter alia*, "the appropriateness of, and necessity for, the current foster placement * * *." 42 U.S.C. 627(a)(1). In addition, a state must "implement[] and [be] operating to the satisfaction of the Secretary" a specified group of foster care programs, including "a case review system * * * [under Title IV-E] for each child receiving foster care under the supervision of the State * * *." 42 U.S.C. 627(a)(2)(B).

2. Respondents in this case are five individual foster children and a class of children in foster care under the custody of the Baltimore City Department of Social Services. Respondents brought suit in 1984 against petitioners, various Maryland state and local social welfare employees. Respondents asserted that they suffered a variety of injuries, including physical and emotional abuse and inadequate medical care, while in foster homes to which they were assigned by petitioners. Respondents alleged that petitioners failed to investigate properly the treatment and care provided by foster homes and failed to respond adequately to information indicating that respondents were being mistreated. Pet. App. 4a, 9a-12a, 28a-30a; Pet. 3-4.

Respondents sought relief under 42 U.S.C. 1983, which provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. They claimed that the alleged acts and omissions by petitioners violated, *inter alia*, the foster care provisions of the Social Security Act

and the Due Process Clause of the Fourteenth Amendment. Respondents sought classwide declaratory and injunctive relief relating to the administration of petitioners' foster care programs, and, further, sought damages from petitioners for the physical and emotional injuries allegedly suffered while in the care of their foster families. See Br. in Opp. App.

Respondents moved for preliminary injunctive relief and petitioners filed a motion for partial summary judgment. Petitioners' summary judgment motion, which was confined to the claims for damages, was predicated on the defense of qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny.² In July 1987, the district court granted respondents' motion and denied petitioners' motion. Pet. App. 25a-72a. In rejecting petitioners' qualified immunity defense, the district court held, inter alia, that the Social Security Act's foster care provisions imposed clearly established legal obligations on state foster care personnel and that challenges to a state's compliance with those obligations may be brought under 42 U.S.C. 1983. Pet. App. 65a-72a. Petitioners appealed the preliminary injunction and the denial of summary judgment to the Fourth Circuit.

3. The court of appeals affirmed (Pet. App. 1a-24a). The court first upheld the district court's preliminary injunction, finding that respondents had stated a valid due process claim and that they had satisfied the other re-

² In moving for partial summary judgment, petitioners initially asserted qualified immunity only as to the allegations of conduct that occurred prior to 1980. Thereafter, in argument before the district court, and in their appeal to the Fourth Circuit, petitioners asserted immunity as to conduct engaged in both before and after 1980 (Pet. App. 15a).

quirements for injunctive relief (*id.* at 6a-15a).³ Turning to petitioners' claim for damages, the court of appeals held that petitioners are not entitled to qualified immunity under *Harlow* because their alleged conduct violated clearly established statutory duties under the Social Security Act (*id.* at 15a-24a). In particular, the court explained that "[t]aken together," the statutory foster care provisions "spell out a standard of conduct [by petitioners], and as a corollary rights in [respondents], which [respondents] have alleged have been denied" (*id.* at 22a-23a). The court of appeals also held that in elaborating the right to sue under Section 1983 this Court has not "distinguish[ed] between prospective equitable relief and an action for money damages" (Pet. App. 22a-23a).

DISCUSSION

Two legal questions decided by the court of appeals are arguably raised by the present petition. The court addressed, first, the issue of qualified immunity, and held that the acts and omissions allegedly committed by petitioners violated "clearly established" legal standards under the foster care provisions of the Social Security Act. It therefore concluded that petitioners are not entitled to qualified immunity. Thereafter, the court of appeals held that Section 1983 provides a cause of action to recover damages for violations of the foster care provisions.

We believe that the first holding rests on a highly questionable application of this Court's immunity decisions. Nevertheless, in our view this aspect of the court's decision does not warrant further review at this time. The second holding, however, raises important and unresolved issues

³ Petitioners have not asked this Court to review the court of appeals' decision regarding the preliminary injunction.

concerning the availability of damages under Section 1983 for violations of federal Spending Clause statutes. Accordingly, we believe that that portion of the court of appeals' decision merits consideration by this Court.⁴

1. In the *Harlow* case, this Court held that an official is entitled to qualified immunity if his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (457 U.S. at 818). More recently, in *Anderson v. Creighton*, No. 85-1520 (June 25, 1987), the Court held that plaintiffs cannot circumvent the *Harlow* standard "simply by alleging violation of extremely abstract rights" (slip op. 4). The Court explained that in order for a defense of qualified immunity to be overcome, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*ibid.*). Thus, under *Anderson*, a court cannot resolve qualified immunity issues simply by asking whether a constitutional or statutory right is "clearly established" in the abstract. Instead, it must ask whether the official's actions fell within the clearly established contours of that right. That inquiry is necessarily "fact-specific" (*Anderson*, slip op. 6), in that the court must examine the particular actions the defendant is alleged to have performed and determine whether the governing legal standards clearly proscribed those acts.

In concluding that petitioners violated "clearly established" statutory rights, the court of appeals did not perform the analysis mandated by *Anderson*. Rather, the

⁴ Petitioners appear to collapse both issues into a single Question Presented. We believe that the issues are analytically distinct, and thus we address them separately.

court simply recited the statutory provisions at issue and, without further discussion, surmised that “[t]aken together * * * these statutory provisions spell out a standard of conduct * * * which plaintiffs have alleged have been denied” (Pet. App. 22a-23a). The court’s discussion is almost wholly divorced from the specific controversy before it. Although the complaint sets forth detailed allegations concerning the actions of petitioners, the court made no apparent effort to compare the asserted statutory rights with the specific conduct alleged in the complaint. The court thus failed to determine whether “[t]he contours of the right[s] [were] sufficiently clear” (*Anderson*, slip op. 4) that petitioners should have understood that their alleged actions violated those rights.⁵

For several reasons, however, we do not believe that the court’s resolution of the qualified immunity issue warrants review by this Court. While plainly challenging the denial of immunity in the Question Presented (see Pet. i), petitioners focus primarily on the court of appeals’ holding that Section 1983 provides private remedies in general, and

⁵ The Court’s failure to follow *Anderson* is especially pronounced because the complaint, rather than alleging similar conduct by each petitioner, alleges significantly different types of conduct by different petitioners. For example, respondents allege that particular Baltimore social workers failed to respond properly to specific instances of abuse and neglect. See, e.g., Complaint ¶¶ 65-129 (Br. in Opp. App. 50-80). At the same time, respondents allege that senior state administrators maintained inadequate oversight over the municipal social service programs involved in the litigation. See, e.g., Complaint ¶ 234 (Br. in Opp. App. 125-128). Under *Anderson*, petitioners’ qualified immunity claims cannot properly be resolved without asking whether each of these persons should have known that his or her particular actions violated federal law. In contrast, the court of appeals adopted a blunderbuss approach that disposed of 23 individuals’ qualified immunity claims in a single sentence (Pet. App. 17a-18a).

damages in particular, for violations of the foster care provisions of the Social Security Act. See pp. 10-15, *infra*. The petition does not contend in any detail that the court of appeals actually erred in concluding that petitioners violated clearly established statutory rights. We are reluctant to urge this Court to resolve an issue that petitioners themselves have not addressed clearly.

Second, although the court of appeals did not follow the standards set forth in *Anderson*, that failure, without more, does not justify further review by this Court at the present time. The analytic framework established by *Anderson* is clear, and petitioners do not suggest that the lower courts have generally experienced difficulties in applying it. Moreover, despite the court's failure to apply the standards set forth in *Anderson*, it is not clear to us that the court of appeals erred in its ultimate holding that petitioners (or at least some of them) are not entitled to qualified immunity. A careful reading of the complaint suggests strongly that at least some of respondents' allegations might withstand qualified-immunity scrutiny under *Anderson* and *Harlow*. For example, the complaint specifically alleges that petitioners failed to prepare case plans and failed to conduct case reviews for respondents. See, e.g., Complaint ¶¶ 77, 124-125, 179-180, 202-203 (Br. in Opp. App. 54, 78, 98-99, 108). At least since 1980, the foster care provisions of the Social Security Act have expressly obligated participating states to prepare case plans and conduct periodic case reviews. See 42 U.S.C. (& Supp. IV) 627(a)(2)(B), 671(a)(6), 675(1), 675(5)(B). The complaint also alleges that petitioners failed to report known instances of child abuse to responsible courts and law enforcement agencies. See, e.g., Complaint ¶¶ 98-117, 235(e) (Br. in Opp. App. 62-74, 130). Since 1980, the governing statutory provisions have expressly provided

that when any state agency "has reason to believe" that a foster home "is unsuitable for the child because of the neglect, abuse, or exploitation of such child," the agency shall notify "the appropriate court or law enforcement agency." 42 U.S.C. 671(a)(9).⁶

Finally, the court of appeals' qualified immunity holding does not appear to be in conflict with the decision of any other court of appeals. Thus far, only one other court of appeals—the Fifth Circuit—has squarely addressed a claim of qualified immunity involving the foster care provisions of the Social Security Act. See *Del A. v. Edwards*, 855 F.2d 1148 (5th Cir. 1988). And the Fifth Circuit in that case, like the court of appeals in this one, concluded that the state officials were not entitled to qualified immunity. *Del A.*, 855 F.2d at 1152-1154. Review by this Court properly can be deferred until there is a conflict among the circuits over the meaning of the foster care provisions or the "clearly established" nature of the rights they create.

2. The court of appeals also held (Pet. App. 22a-23a), albeit in a single, somewhat cryptic sentence, that Section 1983 provides a private right of action, including a right to recover damages, for violations of the foster care provi-

⁶ It is unclear whether a reversal by this Court of the court of appeals' denial of qualified immunity on the statutory claims would lead to termination of the damages actions as to any of the defendants. Respondents also pursued in their complaint a constitutional theory of liability, and the district court denied petitioners' summary judgment motion resting on qualified immunity from those claims (Pet. App. 64a). Having upheld the denial of immunity with regard to the statutory claims, the court of appeals found it unnecessary to decide the issue of immunity from the constitutional claims (*id.* at 18a). If this Court were to reverse the denial of immunity here in issue, the court of appeals would then be required to decide the issue of immunity on the constitutional claims.

sions of the Social Security Act. Petitioners contest that holding on two grounds. First, petitioners argue broadly (Pet. 15-18) that the Social Security Act's foster care provisions do not create rights that may be enforced under Section 1983. Second, petitioners contend more narrowly (Pet. 12-15, 18-20) that even if enforceable rights have been created, Section 1983 does not authorize federal courts to award damages (as opposed to injunctive relief) for their deprivation. Petitioners' second argument raises serious issues that merit review by this Court.

a. The issue on appeal to the court below was whether petitioners were entitled to qualified immunity. After finding the substantive obligations arising under the statute to be clearly established, the court proceeded to rule further that there is a cause of action for damages. It does not appear that the court was required to reach this issue in order to resolve the question of immunity. Whether or not it was required to do so, however, there is little doubt that the court of appeals had the power to reach and decide the damages issue under Section 1983.

The court's jurisdiction was predicated on *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which authorizes interlocutory appeals from denials of qualified immunity claims. Appellate jurisdiction under *Mitchell v. Forsyth* is not strictly confined to the issue of qualified immunity, but rather extends to ancillary issues that are potentially dispositive of the underlying litigation. See, e.g., *Drake v. Scott*, 812 F.2d 395, 397-399, modified on other grounds, 823 F.2d 239 (8th Cir. 1987), cert. denied, No. 87-587 (Nov. 30, 1987); *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985). Here, the availability of qualified immunity and the right to recover damages under Section 1983 involve related questions about the obligations imposed by the Social Security Act's foster care provisions, and a decision that

damages are unavailable under Section 1983 would terminate the claims against petitioners in their individual capacities. Under these circumstances, the Fourth Circuit was free to reach and decide the availability of damages under Section 1983.

b. In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that Section 1983 normally "encompasses violations [by state officials] of federal statutory as well as constitutional law." Respondents' suit seeks relief for alleged violations of a federal statute and hence comes within the general scope of Section 1983 under *Thiboutot*.⁷ By its own terms, however, Section 1983 provides a cause of action only for deprivations of rights "secured by" federal law. Accordingly, no relief is available when a federal statute does not create enforceable rights for purposes of Section 1983. See, e.g., *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418, 423 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981). For example, in the *Pennhurst* case, the Court held that the "bill of rights" provision of the federal Developmentally Disabled Assistance Act does not create enforceable rights in favor of mentally retarded persons and hence may not be enforced under Section 1983. Relying on *Pennhurst*, petitioners argue that the foster care provisions of the Social Security Act likewise do not create enforceable rights under Section 1983.

We believe that this broad challenge to the court of appeals' decision does not merit the Court's attention. In

⁷ Respondents also are seeking relief from alleged violations by petitioners of their rights under the Fourteenth Amendment. See n. 6, *supra*.

Rosado v. Wyman, 397 U.S. 397, 420 (1970) (emphasis omitted), a case that involved other provisions of the AFDC statute, the Court concluded "that petitioners are entitled to declaratory relief and an appropriate injunction by the District Court against the payment of federal monies * * * should the state not develop a conforming plan within a reasonable period of time." And in *Pennhurst*, the court indicated in two ways that some form of injunctive relief is available as a remedy for violation of the conditions of the AFDC statute. First, it cited the AFDC statute as evidence that "where Congress has intended the States to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly." 451 U.S. at 17-18. Second, it referred without question or apparent reservation to the holding of *Rosado*, allowing an injunctive action by welfare claimants under the AFDC statute. *Id.* at 29.

In a number of other cases, this Court has entertained Section 1983 actions challenging state compliance with AFDC funding conditions, including at least one suit involving the same foster care program at issue here. See, e.g., *Miller v. Youakim*, *supra* (foster care under former Section 408); *King v. Smith*, 392 U.S. 309 (1968). To our knowledge, no court has ever suggested that the foster care provisions of the Social Security Act do not create enforceable rights for purposes of Section 1983.

c. Petitioners also assert (Pet. 12-15, 18-20), more narrowly, that the court of appeals erred in holding that Section 1983 authorizes courts to award damages for violations of the foster care provisions. We agree that that contention merits review.

i. The court of appeals' determination that damages are available under Section 1983 for violations of the foster care provisions is in conflict with decisions of two other courts of appeals. In *Scrivner v. Andrews*, 816 F.2d

261 (1987), the Sixth Circuit rejected a Section 1983 claim for damages based on the foster care provisions added to the Social Security Act in 1980 by the Adoption Assistance Act (see pp. 2-4, *supra*). The plaintiffs, a mother and daughter separated by Kentucky social welfare personnel, claimed that the state had deprived them of a right to "meaningful visitation" protected by the Adoption Assistance Act. The Sixth Circuit held that the Adoption Assistance Act did not create such a right, but that even if it did, "damages are not available in a § 1983 action alleging a violation of the Adoption Assistance Act" (816 F.2d at 264).⁸

The Eighth Circuit reached a similar conclusion in *Harpole v. Arkansas Dep't of Human Services*, 820 F.2d 923 (1987). There, a grandmother brought suit for damages under Section 1983 based on the death of her grandchild, a recipient of AFDC support who died because of his mother's failure to attend to his medical needs. The grandmother contended, *inter alia*, that the state had failed to comply with a statutory duty of protection created by the AFDC program. The Eighth Circuit affirmed the dismissal of the grandmother's statutory claim, reasoning that the AFDC program was "enacted to enable states to provide financial assistance to needy persons and not as a means of seeking compensation when one of those persons is indirectly injured by the state." 820 F.2d at 928. Although the Eighth Circuit's opinion is not without ambiguity, the court of appeals appears to have held that

⁸ Although the specific foster care claim before the Sixth Circuit in *Scrivner* differed from the claim in this case, the Sixth Circuit concluded broadly that violations of the Act's foster care provisions (as amended by the Adoption Assistance Act) do not support a Section 1983 damages action.

violations of the AFDC provisions do not support a claim for damages under Section 1983. See *ibid.*⁹

ii. The division among the circuits regarding the availability of damages under Section 1983 for violations of the Social Security Act's foster care provisions reflects confusion over the more fundamental question whether Section 1983 authorizes courts to award damages for violations of federal Spending Clause legislation. This Court has addressed that question twice but has not definitively resolved it.

In *Pennhurst*, this Court stated, without deciding, that even when a Spending Clause statute imposes unambiguous (and hence binding) conditions on a grant of federal funds, it remains to be determined both whether there is "a private cause of action to compel state compliance with those conditions" (451 U.S. at 27-28 (footnote omitted)), and precisely what remedy may be available (*id.* at 29-30). The Court suggested that a court might be confined to prospective injunctive relief—more particularly, to "enjoining the Federal Government from providing funds" or directing the state to choose between rejecting the funds and complying with the condition. *Id.* at 29, 30 n.23. Noting that "[i]n no case * * * have we required a State to provide money to plaintiffs" based on violations of Spending Clause legislation, the Court questioned whether federal courts "could require the State to pay the additional sums demanded by compliance with federal standards." *Id.* at 29. However, the Court ultimately

⁹ *Harpole* involved abuse of a child by a natural parent rather than a foster parent, and hence the statutory claim rested on the general provisions of the AFDC program rather than the particular provisions regarding foster care. The Eighth Circuit's reasoning nonetheless appears to apply with equal force to the Social Security Act's foster care provisions.

declined to decide this question, which it characterized as a "difficult" one, because the court of appeals had not reached it. *Id.* at 30.

The court returned to the question in *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983). Justice White, in a plurality opinion joined by then-Justice Rehnquist, asserted that "'make whole' remedies are not ordinarily appropriate" for violations of conditions in Spending Clause statutes and that, while "damages indeed are usually available in a § 1983 action, * * * such is not the case when the plaintiff alleges only a deprivation of rights secured by a Spending Clause statute." 463 U.S. at 596-597, 602 n.23 (citing *Pennhurst*). Four Justices rejected that view, concluding that violations of Spending Clause legislation should be treated no differently from violations of non-Spending Clause legislation for purposes of damages. See *id.* at 624-634 (Marshall, J., dissenting); *id.* at 636-639 (Stevens, Brennan & Blackmun, JJ., dissenting). The three remaining members of the Court declined to resolve the issue, deciding the case on other grounds.¹⁰ As a result, no

¹⁰ Justice O'Connor, who concurred in the judgment, stated that "[f]or reasons given in Part I of the dissent by Justice Stevens, * * * I cannot agree with the limitations that Justice White's opinion would place on the scope of equitable relief available to private litigants suing under Title VI." 463 U.S. at 612. That statement might be read to support the four dissenters, rejecting the availability of damages in (UN) Spending Clause actions under Section 1983. On the other hand, Justice O'Connor also stated that she had "no occasion to address the question whether there is a private cause of action under Title VI for damages relief." 463 U.S. at 612 n.1. In addition, Justice O'Connor referred only to the availability of relief under Title VI, not to relief under Section 1983. *Ibid.* Based on the latter references, we do not believe that the *Guardians Association* case resolves the question whether damages are available under Section 1983 for violations of Spending Clause legislation.

opinion in *Guardians Association* commanded a majority of the Court concerning the availability of damages under Section 1983 for violations of Spending Clause statutes.

iii. Whether Section 1983 creates a damages remedy for violations of the Social Security Act's foster care provisions is a question of considerable practical importance. The Social Security Act's foster care provisions cover thousands of children in all fifty states. Government responsibility for the welfare of these children is spread through countless state and local social welfare departments. If the Fourth Circuit's view of the law is correct, thousands of state and local social welfare workers will now be exposed to the risk of personal financial liability under Section 1983 for injuries suffered by foster children in their foster homes. The practical consequences of such liability are potentially dramatic, not only for individual social welfare employees but for the programs that they administer.

The broader question underlying the Fourth Circuit's decision—whether Section 1983 supports a claim for damages for violations of federal Spending Clause legislation—has even more far-reaching practical implications. Dozens of federal statutes, including most of the Nation's major social welfare legislation, provide federal funding to states and localities under the Spending Clause in return for compliance with federally mandated conditions. Among the programs created by such statutes are the AFDC, Medicaid, and food stamp programs, which collectively affect tens of millions of Americans. See, e.g., 7 U.S.C. (& Supp. IV) 2011 *et seq.* (food stamps); 42 U.S.C. (& Supp. IV) 601 *et seq.* (AFDC); 42 U.S.C. (& Supp. IV) 1396 *et seq.* (Medicaid). See also *Maine v. Thiboutot*, 448 U.S. at 36-37 (Powell, J., dissenting) (listing additional Spending Clause statutes subject to claims under Section 1983). If state officials may be held personally liable for a

state's failure to comply with conditions imposed by such statutes, the potential scope for litigation and liability is enormous.

As noted above, this Court has squarely posed, but thus far failed definitively to answer, the question whether damages are available under Section 1983 in Spending Clause cases. The absence of a dispositive answer may have spawned a measure of conflict in the lower courts over the availability of damages for violations of the Social Security Act's foster care provisions. In *Scrivner*, the Sixth Circuit relied on Justice White's opinion in *Guardians Association* to support the conclusion that damages are not available for such violations. See 816 F.2d at 264. By contrast, the court below relied on this Court's recent decision in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), to support the opposite conclusion. See Pet. App. 22a-23a.¹¹

For all of these reasons, the specific question whether damages are available for violations of the Social Security Act's foster care provisions, and the more general question whether Section 1983 authorizes damages for violations of

¹¹ The court of appeals misread the *Wright* case. In *Wright*, the Court held that public housing tenants may bring suit under Section 1983 to redress violations of federal rent ceilings imposed by the Brooke Amendment to the Housing Act of 1937, a Spending Clause statute. The plaintiffs in *Wright*, however, did not seek damages under Section 1983 for the rent violations, nor did this Court address the availability of damages. Instead, the plaintiffs sought only to recover past rental overpayments. See *Wright*, 479 U.S. at 422 n.5; cf. *Bowen v. Massachusetts*, No. 87-712 (June 29, 1988), slip op. 13 (noting "long recognized" distinction between action at law for damages and equitable action "for 'the recovery of specific property or monies' ") (emphasis in original). Nothing in *Wright* suggests that the Court intended to endorse the general availability of damages under Section 1983 in Spending Clause cases.

federal Spending Clause statutes, warrant this Court's attention. In our view, this case is an appropriate vehicle for addressing those questions. Accordingly, we believe that that portion of petitioners' Question Presented which we have reformulated as our Question Number 1 merits further review by this Court.

CONCLUSION

For the foregoing reasons, and to the extent noted above, the petition for certiorari should be granted.

Respectfully submitted.

CHARLES FRIED

Solicitor General

JOHN R. BOLTON

Assistant Attorney General

DONALD B. AYER

Deputy Solicitor General

LAWRENCE S. ROBBINS

Assistant to the Solicitor General

JOHN F. CORDES

SCOTT R. MCINTOSH

Attorneys

NOVEMBER 1988